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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1015

LOCAL 189, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC, *Petitioners*,

v.

UNITED STATES OF AMERICA; LOCAL 189a, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; DAVID JOHNSON, SR.; AND ANTHONY HILL, *Respondents*.

BRIEF FOR RESPONDENTS LOCAL 189a, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; DAVID JOHNSON, SR.; AND ANTHONY HILL IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The opinion and order of the District Court for the Eastern District of Louisiana, entered March 26, 1968, is reported at 282 F. Supp. 39, and is reprinted at pages 8a-17a of the Petition for Certiorari in this Court. The opinion of the Court of Appeals for the Fifth Circuit, entered on July 28, 1969, is reported at 416 F.2d 980 and is reprinted at pages 18a-49a of the Petition for Certiorari.

QUESTION PRESENTED

Whether a seniority system providing for promotions within progression lines on the basis of length of service in the job beneath the vacancy is unlawful under Title VII of the Civil Rights Act of 1964, in situations in which black workers were excluded until 1965 from the job in which seniority is measured?

STATEMENT OF THE CASE

I. Factual Statement

The facts relevant to a decision of the issues before the Court were stipulated in the trial court:

1. Prior to May, 1964, the paper mill in Bogalusa, Louisiana, operated by the Crown Zellerbach Corporation (hereinafter "Crown"), was rigidly segregated as to race, primarily through use of separate black and white progression lines or promotional ladders within each department. With a single exception, all the white jobs in these mixed racial departments were more highly paid and involved greater responsibility than the best job in the black line of progression. In addition, several of the most desirable departments in which to work were reserved exclusively for whites. (R. 474; R. 35-36 and Exh. Vol. 1-11).* By actions taken in 1964 and 1965, these formal racial restrictions were abandoned and black employees were permitted to transfer, as vacancies occurred, to white departments and to the entry point of white lines of progression. (R. 37; R. 360). In 1966,

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* "R." refers to the Multilith Record filed by petitioners in this Court. "Exh. Vol." refers to pages of the exhibit volumes filed by petitioners in this Court. "App." refers to the Appendix to the Petition for Certiorari.

the separate black and white progression lines within single departments were merged on the basis of existing job pay rates (R. 38).

2. No changes, however, were made in the seniority system. Promotion in all progression lines was, under the terms of the Collective Bargaining Agreement between Crown and the United Papermakers and Paperworkers, AFL-CIO, CLC (hereinafter "UPP"), determined by "job seniority" (R. 37). Under the job seniority standard, promotions were awarded to the employee in the job slot below the vacancy who had served the longest in that job slot.[1] No reference whatsoever was made to an employee's service in other jobs or other departments in the mill.

3. As a result of the lifting of formal racial restrictions and the merger of progression lines, some progression lines at the mill became racially integrated. But, since black progression lines were merged beneath related white progression lines, and since black employees were permitted to transfer only to the bottom rung of the progression ladders in formerly all-white departments, black employees were forced to take their places behind all the white employees, including the relative newcomers, who had entered the white portion of the merged line or the formerly all-white line before them. And the job seniority system assured that the blacks would permanently remain behind these whites in terms of promotional rights within the line.

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[1] The two general exceptions to this rule were voluntary waivers of the right to promotion by the senior employee, or a determination by the company that the senior employee did not have the ability to perform the higher rate job. (R. 37).

II. Proceedings Below

On January 30, 1968, this case was filed by the United States, proceeding under section 707 of the Civil Rights Act of 1964, and Executive Order 11246, in the United States District Court for the Eastern District of Louisiana. The defendants were UPP, Local 189 of UPP, which represents the white employees at the mill, and Crown. Jurisdiction of the district court was invoked pursuant to section 707(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(b), and pursuant to 28 U.S.C. § 1345. In its complaint, the Government challenged the legality of job seniority in the circumstances of this case, and asked that the defendants be ordered to grant promotions within a line of progression on the basis of the total length of service of competing employees ("employment" or "mill" seniority).[2] The district court permitted Local 189a of UPP, which represents the black employees at the mill, and Anthony Hill and David Johnson Sr.,

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[2] The initiation of this action by the Government was preceded by negotiations between Crown and the Office of Contract Compliance of the Department of Labor (OFCC). (The OFCC is responsible for the enforcement of Executive Order 11246, 30 Fed. Reg. 12,319 (1965), which prohibits discrimination by government contractors.) The OFCC and Crown had agreed on a compromise modification of the seniority system by which seniority within progression lines would be measured by the combination or total of an employee's job and employment seniority. (R. 40-46). The white union threatened to strike to prevent the implementation of this change, and one of the purposes of the Government's suit was to enjoin the strike. (R. 5-6). But in its complaint, the Government challenged the legality of the combination seniority system that had been agreed to by the OFCC and asked that any reference to job seniority, in the circumstances of this case, be held unlawful. At various stages in this litigation, petitioners have claimed that the prior agreement between Crown and the OFCC bars the Government's different position in this suit. This claim was rejected by the court below, and in any event it plainly has no application to the relief granted to the private respondents who intervened in the case. See note 3, *infra*.

two black employees at the mill, on behalf of themselves and the class of black employees, to intervene as plaintiffs. The intervenors joined the Government in challenging the use of job seniority in the promotion system and in asking that an employment seniority system be instituted.[3]

After a hearing on the merits, the district court, on March 27, 1968, held that, in the facts of this case, any reference to job seniority in the promotional standard constituted racial discrimination against black employees formerly excluded from white jobs, and that, in situations affecting these employees, the seniority of competing employees for purposes of promotion and demotion must be measured by total length of service. On July 28, 1969, the court of appeals unanimously affirmed the district court order. UPP and Local 189 are seeking review here of that decision.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. There Is No Judicial, Executive or Agency Disagreement on the Question Presented.

Petitioners and respondents agree that the sole issue in this case is the status of job or departmental

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[3] Respondents Hill and Johnson were plaintiffs in an earlier filed Title VII action against the same defendants that was pending in another section of the same district court and that raised the identical seniority issue. *Hill* v. *Crown Zellerbach Corp.*, Civil Action 67-286, section G, E.D. La. At the time this case was filed, the *Hill* case was held up pending review by the court of appeals of a decision of the district court concerning permissible parties plaintiff and the scope of the class. 271 F. Supp. 258, (E.D. La. 1967), *rev'd sub nom., Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968). For this reason, and because of the time limitations on temporary restraining orders set forth in Rule 65, it appeared that this case would be decided prior to *Hill*. The interventions were sought to ensure that the seniority question would not be decided without participation of the affected black employees.

seniority systems (as distinguished from plant-wide seniority systems) in plants where black and white jobs were segregated prior to Title VII of the Civil Rights Act of 1964.[4] The basic premise of the Petition for a Writ of Certiorari—that there is judicial, executive and agency disagreement as to the proper resolution of this question—is incorrect.

The only authority that petitioners have cited to demonstrate judicial disagreement with the decision of the court below is the district court decision in *Griggs* v. *Duke Power Company*.[5] This decision did not even involve a seniority system, but rather dealt with a challenge to an employer's use of tests and educational requirements in promoting employees. *Griggs* is relied upon by petitioners on the theory that the district court's decision upholding the test and educational requirements applies by analogy to support the seniority arrangements involved in this case. Whatever the validity of that analogy, the district court decision was reversed by the Court of Appeals for the Fourth Circuit on January 9, 1970, with respect to the precise point for which it is cited by petitioners here.[6] In so doing, the Fourth Circuit expressly followed the

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[4] The March 27, 1968 decision of the district court left unresolved several other issues that were raised by the complaint and by the complaint in intervention. The seniority issue was decided separately because the union defendants declined to consent to a continuation of the temporary restraining order against the strike until all of the issues in the case could be prepared for trial. The remaining issues were tried during the week of April 30, 1968, and decided on June 26, 1968. 60 CCH Lab. Cases ¶ 9274. Only the issue decided by the district court on March 27 was before the court of appeals and is before this Court.

[5] 292 F. Supp. 243 (M.D. N.C. 1968).

[6] 61 CCH Lab. Cas. ¶ 9379.

prior decision in that circuit of Judge Butzner, sitting as a district judge, in *Quarles* v. *Phillip Morris Co.*[7] The Fourth Circuit also cited and approved the decision of the court below in this case.

The petitioners failed to mention that the Court of Appeals for the Eighth Circuit, in *United States* v. *Sheet Metal Workers, Local 36*,[8] followed the decision of the court below in this case in declaring unlawful referral provisions in a formerly white-only craft union that based priority for referral on length of service under the union contract. The same conclusion in a similar factual context was also reached by a district court in the Sixth Circuit in *Dobbins* v. *Electrical Workers, Local 212*.[9] Moreover, in *United States* v. *Hayes International Corporation*,[10] another panel of the Fifth Circuit adopted the same interpretation of the Act as did the panel that decided this case.[11]

The only decision anywhere that has not been reversed and that is in conflict with the interpretation of the court below is Judge Allgood's decision in *United States* v. *H. K. Porter Co.*[12] That case is pending on appeal in the Fifth Circuit,[13] and is plainly con-

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[7] 279 F. Supp. 505 (E.D. Va. 1968). No appeal was taken in this case.

[8] 416 F. 2d 123 (8th Cir. 1969).

[9] 292 F. Supp. 413 (N.D. Ohio 1968). This case was not appealed.

[10] 415 F. 2d 1038 (5th Cir. 1969).

[11] Accord: *Asbestos Workers, Local 53* v. *Vogler*, 407 F. 2d 1047, 1054-55 (5th Cir. 1969).

[12] 296 F. Supp. 40 (N.D. Ala. 1968).

[13] No. 27,703.

trolled by the decision of that court in this case and in *Hayes International.*

Nor is there conflict among the executive departments or Equal Employment Opportunity Commission on the legality of seniority rules that limit the present opportunities of black workers because of their prior exclusion from certain jobs. The position of the Department of Justice, which has responsibility under section 707 for the enforcement of Title VII,[14] is squarely set out in its papers as a respondent in this case, and in numerous other enforcement actions.[15] The position of the Office of Federal Contract Compliance of the Department of Labor as to the requirements of the Executive Order was equivocal prior to the institution of this suit (R. 45-46; note 2, *supra*), but since that time OFCC has uniformly adhered to the position advanced by respondents and reflected by the decision of the court below.[16]

Petitioners have emphasized the failure of the Equal Employment Opportunity Commission to raise the seniority issue in 1965 negotiations concerning the merger of formerly segregated lines of progression; but at least since the fall of 1967, the EEOC has vigorously

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[14] 42 U.S.C. § 2000e-6.

[15] *United States* v. *Sheet Metal Workers, Local 36, supra; Dobbins* v. *Local 212, supra; United States* v. *H. K. Porter Co., supra; United States* v. *Hayes International Corp., supra.*

[16] See U. S. Dept. of Labor, Office of Federal Contract Compliance, Memorandum from Ward McCreedy, Acting Director, on Discriminatory Seniority Systems, Aug. 8, 1968 (reprinted as an Appendix to this Brief); Agreement with International Paper Co., CCH Employment Practices Guide ¶ 8004 (Transfer Binder) (OFCC Aug. 5, 1968).

asserted the position adopted by respondents and the court below in this case.[17]

In sum, there is unanimity of opinion in accord with the decision of the court below among those responsible for the enforcement and the interpretation of Title VII and of the Executive Order.[18] Far from alleviating uncertainty, as petitioners suggest, the issuance of a Writ of Certiorari in this case would *create* uncertainty as to the applicable legal requirements until such time as a decision on the merits is rendered by this Court. During this interval, the pendency of review would forestall the now vigorous public and private efforts under Title VII and the Executive Order to eliminate discriminatory seniority systems.

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[17] The EEOC position that, in formerly segregated plants, seniority rules that refer to length of service in jobs from which blacks were excluded are unlawful, was reflected in *amicus curiae* briefs submitted to the district courts in *Quarles* v. *Phillip Morris, Inc.*, *supra*, and in *Hicks* v. *Crown Zellerbach Corp.*, 58 CCH Lab. Cas. ¶ 9145 (E.D. La. 1968). In both cases, the position of the EEOC was adopted. The position is also set forth in recent reasonable cause determinations made by the Commission under section 706(a) of the Act. *E.g.*, Case No. 7-4-535, CCH Lab. Cas. ¶ 8520 (EEOC Dec. 6, 1968); Case No. YSF9C131, CCH Lab. Cas. ¶ 8528 (EEOC July 11, 1969).

[18] Petitioners have suggested that the conflict that exists between the Department of Labor and the Department of Justice, on the one hand, and the Comptroller General, on the other, with respect to the so-called "Philadelphia Plan" (Dept. of Labor, June 27, 1969) somehow illustrates division on the issues before the Court in this case. (Petition for Certiorari, pp. 4, 10, 30). The Philadelphia Plan involves the establishment of "goals" and "targets" for minority hiring in the construction trades. The legal issue there concerns the impact of section 703(j) of the 1964 Civil Rights Act, which refers to preferential treatment and racial imbalance. Section 703(j) is not involved in this case. This Court certainly would not attempt to resolve the Philadelphia Plan conflict in an unrelated factual context.

II. The Court Below Correctly Held that the Job Seniority Standard of Promotion Constitutes Unlawful Discrimination Against Incumbent Black Employees at the Bogalusa Mill.

Section 703(a)(1) of the Act declares that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race . . ."[19] Section 703(a)(2) provides that "it shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . ."[20] Section 703(c)(1) and (2) of the Act contains similar prohibitions against labor unions.[21] The court below held that the defendants' use of a job seniority standard of promotion in formerly all-white progression lines violated these provisions of the Act.

The strict segregation of all employees at Crown's Bogalusa Mill into separate white and black progression lines prior to 1964 is undisputed. Similarly, there is no question but that the white jobs were far preferable to the black jobs in the plant. After 1966, black employees were permitted to transfer or to advance to the entry point of a former white progression line, but upon entry into the white line (or the white section of merged lines), their rights to promotion, in competition with the other employees in the entry level job, were deter-

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[19] 42 U.S.C. § 2000e-2(a)(1).

[20] 42 U.S.C. § 2000e-2(a)(2).

[21] 42 U.S.C. § 2000e-2(c)(1, 2).

mined by length of service in that job. At each successive level, years of service in the formerly white-only job constituted the standard of promotion. As a result, senior black employees were permanently ranked behind every white employee who preceded them in entering the white line of progression, regardless of their ability to perform the jobs higher in the progression line, or their years of service at the mill.

This standard of promotion constitutes present discrimination based on race against incumbent black employees, because, without any business necessity, it adopts as a measure of promotional rights, a commodity —length of service in white jobs—that these black employees were prohibited from acquiring because of their race. Because of the prior exclusion of blacks from white jobs, the job seniority standard of promotion is analogous to the allocation of employment benefits on the basis of years of attendance at a high school that was limited to white students. Although the standard may appear non-racial on the most superficial examination, the factual context makes plain that it is a discriminatory racial criterion. As Judge Wisdom stated, for the court below:

> "The translation of racial status to job seniority status cannot obscure the hard, cold fact that Negroes at Crown's mill will lose promotions which, *but for* their race, they would surely have won. Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias. It is not decisive therefore that a seniority system may appear to be neutral on its face if the inevitable effect of tying the system to the *past* is to cut into the employee's

> *present* right not to be discriminated against on grounds of race." . . .

416 F.2d at 988; App. at 30a (emphasis in original).

Under the employment or mill seniority system established under the order of the district court, whenever a black employee hired prior to the termination of strict segregation is in a job slot, the relevant seniority standard by which one employee in that job slot is selected for promotion is total length of service with the company. By contrast with job seniority, this standard is neutral as to race in the context of the Bogalusa Mill, since throughout the years Crown hired black as well as white employees, albeit for assignment into segregated progression lines. See generally Cooper and Sobol, "Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion", 82 Harv. L. Rev. 1598, 1635-36 (1969) (hereinafter "Cooper and Sobol").[22]

In this Court, UPP and Local 189 have not argued that job seniority in the Bogalusa Mill does not dis-

[22] Although petitioners have not raised the point here, both Crown and the union defendants argued in both the district court and the court of appeals that the job seniority standard was justified by business necessity in that it ensured that unqualified employees were not promoted to jobs that they were unable to perform. Both courts found that this function could be served in a manner that had a much more limited impact on the promotional rights of black employees. The court below stated:

> "In place of job seniority the court ordered the institution of a mill seniority system carefully tailored to assure that no employee would have a right to a job that he could not perform properly. The court's decision put the emphasis where it belongs: absent a showing that the worker has the ability to handle a particular job, the entry job is the proper beginning for any worker. Under the court's decree, employees still must move up through the various lines of progression job-by-job. As a further restraint, if a certain minimum time is needed in one job to train an employee for the next, a residency requirement may be imposed that

criminate on grounds of race against incumbent black employees. Rather, the thrust of their argument here is that the legislative history of the Act indicates that, notwithstanding the general prohibition against racial discrimination contained in section 703, Congress did not intend to forbid seniority arrangements such as those involved in this case. Apart from the general presumption that should exist against an argument that Congress, in enacting the Equal Employment Opportunity Act, intended to immunize a discriminatory employment practice, the unions' argument is invalid for two reasons:

First, the legislative statements in the Senate to which the union refers preceded by several weeks a major redrafting of the bill. See Cooper and Sobol, *supra,* at 1609-10. When the bill was redrafted it contained, for the first time, specific language dealing with seniority that was enacted as section 703(h).[23] As

> will slow the rise of Negro employees. Under the system that is in effect at the mill now, and that is unaffected by the decree, that residency period is six months. To meet the problem of labor unrest that might result from 'jumping' unrelated to racial issues, the court specifically limited its decree to instances in which Negroes hired before 1966 were among the bidders. Finally, and most importantly, both the court's decree and the existing collective bargaining agreement give Crown Zellerbach the right to deny promotions to employees who lack the ability or qualification to do the job properly."

416 F. 2d at 990; App. at 33a-34a (footnotes omitted).

[23] 42 U.S.C. § 2000e-2(h). This section provides, in pertinent part:

> "(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ., provided that such differences are not the result of an intention to discriminate because of race . . . ."

between legislative interpretations of the earlier version of the bill, and the language of the statute, as enacted, the latter must govern.

The seniority provisions of section 703(h) were interpreted by Judge Butzner in *Quarles* v. *Phillip Morris, Inc., supra,* as invalidating a departmental seniority system applied in a department from which blacks were excluded until 1966:

> "Section 703(h) expressly states the seniority system must be bona fide. The purpose of the act is to eliminate racial discrimination in covered employment. Obviously one characteristic of a *bona fide* seniority system must be lack of discrimination. Nothing in § 703(h), or its legislative history, suggests that a racially discriminatory seniority system established before the act is a *bona fide* seniority system under the act.
>
> * * * *
>
> "Section 703(h) also contains a *proviso* that touches upon the issue. It declares that it shall not be an unlawful employment practice for an employer to apply diferent standards pursuant to a *bona fide* seniority system ' * * * provided that such differences are not the result of an intention to discriminate because of race * * *.' The differences between the terms and conditions of employment for whites and Negroes about which plaintiffs complain are the result of an intention to discriminate in hiring policies on the basis of race before January 1, 1966. The differences that originated before the Act are maintained now. The act does not condone present differences that are the result of an intention to discriminate before the effective date of the Act, although such a provision could have been included in the act had Congress so intended. The court holds that the present differences in departmental seniority of Negroes and whites that result from the

> Company's intentional, racially discriminatory hiring policy before January 1, 1966 are not validated by the *proviso* of § 703(*h*)."

279 F. Supp. at 517-18.

The court below quoted and adopted on this analysis. 416 F.2d at 488; App. at 29a. See also *United States* v. *Sheet Metal Workers, Local 36, supra,* 416 F.2d at 133-34 n. 20; Note, "Title VII, Seniority Discrimination and the Incumbent Negro," 80 Harv. L. Rev. 1260, 1272 (1969). This interpretation of section 703(h) is consistent with the thrust of the other clarifying provisos of section 703, which simply underscore the inapplicability of the Act to certain employment practices that *do not* discriminate on the basis of race, religion, sex or national origin. See Cooper and Sobol, *supra,* at 1613-14.

Section 703(h) is not discussed in the Petition for Certiorari.

Second, even apart from the fact that petitioners are relying on legislative history of a bill that did not pass, and are ignoring express statutory language of the bill that did, the statements relied on by petitioners do not support the conclusion that discriminatory seniority practices in formerly segregated plants were intended to be immunized from attack under the Act.

In *Quarles,* Judge Butzner carefully considered all the statements on the Senate floor dealing with seniority, and concluded as follows:

> "Several facts are evident from the legislative history. First, it contains no express statement about departmental seniority. Nearly all of the references are clearly to employment seniority. None of the excerpts upon which the company and the union rely suggests that as a result of past dis-

> crimination a Negro is to have employment opportunities inferior to those of a white person who has less employment seniority. Second, the legislative history indicates that a discriminatory seniority system established before the act cannot be held lawful under the act. The history leads the court to conclude that Congress did not intend to require 'reverse discrimination'; that is, the act does not require that Negroes be preferred over white employees who possess employment seniority. It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."

79 F. Supp. at 516. This analysis was expressly dopted by the court below. 416 F.2d at 987-88; App. t 28a-29a.

Judge Butzner's distinction between employment seiority and departmental or job seniority is soundly ased on the policy underlying the Act. When departental or job seniority is attacked, a well-defined and imited group of black workers are complaining of a ractice that injures only them and that relegates them o second-class status relative to their longtime white o-workers. This goes to the heart of Title VII. On he other hand, an employment seniority system does ot distinguish between longtime co-workers. It adersely affects only new entrants to a plant and, as uch, could be attacked only by the relatively undefined nd unspecific group of blacks who might have been ired earlier, had there been no discrimination. Beause of this basic difference, the legislative comments ealing with employment seniority should not be held pplicable to job and departmental seniority systems. See Cooper and Sobol, *supra*, at 1628-29, 1632-36.

The Unions make only one other argument in support of their contention that the decision below "is

demonstrably in error". They argue that the court below erred in analogizing the situation presented to decisions of this Court relating to proper relief in cases involving abridgment on grounds of race of the constitutionally protected right to vote. *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Gaston County* v. *United States*, 395 U.S. 285 (1969). The difference, according to the unions, is that in the case of the right to vote, past denials were unlawful at the time they occurred because constitutional rights were involved, making appropriate measures to remedy the illegality, while in the case of discriminatory employment practices, there was no illegality until 1965, and remedial measures with respect to pre-1965 practices are impermissible. The argument is unavailing.

Both the district court and the court of appeals sustained the contention of the private plaintiffs and the Government that the job seniority system in the Bogalusa Mill resulted in *present* racial discrimination, in that it penalized black employees again and again for the prior discrimination against them. It is the fact of the prior discrimination and not its legality or illegality that is controlling. Undoubtedly, the same result would have been reached if the prior segregation was mandated by state law rather than the collective bargaining agreement. The court's injunction does not remedy the effects of past discrimination; it merely prevents future discrimination by prohibiting the unions and the company from conditioning future job assignments on past status.

What would be retroactive application of the Act would be the repayment by the defendants to over 200 black employees of the economic benefits, the dignity and the confidence in their abilities of which they were deprived by virtue of their relegation to menial jobs in segregated progression lines, while year after year

white youths were hired to fill the desirable jobs in the plant. For better or for worse, no one has asked the defendants to right these wrongs. But petitioners' argument that the lower court's effort to limit the future disadvantage to black employees of their prior segregation constitutes some form of retroactive application or preferential treatment is totally without merit and must be rejected.

Moreover, contrary to the suggestion of the petitioners, the prior job segregation was unlawful. It cannot be doubted that the maintenance of segregated jobs was in violation of executive orders prohibiting racial discrimination by government contractors. Crown was subject to these orders at least since 1961. (R. 35). Moreover, if the district courts in *Dobbins* v. *Electrical Workers, Local 212, supra,* and *Clark* v. *American Marine Corp.*[24], have correctly interpreted the decision of this Court in *Jones* v. *Mayer Co.*[25] to mean that discrimination in employment violates 42 U.S.C. § 1981, then the segregated practices were also unlawful under that provision. On this view, the substitution of mill for job seniority would be justified as a remedial measure supported by *Louisiana* v. *United States, supra,* and *Gaston County* v. *United States, supra.* See Cooper and Sobol, *supra,* at 1632.

CONCLUSION

The question presented here has been decided by three separate courts of appeals and a district court in another circuit, all in agreement with the decision below. Petitioners have not made an adequate show-

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[24] 61 CCH Lab. Cas. ¶ 9320 (E.D. La. 1969).

[25] 392 U.S. 409 (1969).

ing that there is doubt as to the correctness of all these rulings as might justify review. The question is undoubtedly of great practical importance, but, in one respect, its importance argues against review. Almost six years after passage of the Act, there is now unanimity of opinion on the question involved. The prevailing interpretation forms the basis of a broad enforcement program, relying on both negotiation and litigation. Because of the doubt that a grant of certiorari would generate, this important effort would be forestalled for the period of review.

The lower federal courts have satisfactorily resolved the question here in issue. Respondents pray that the petition be denied.

Respectfully submitted,

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January 30, 1970

APPENDIX

U. S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
WASHINGTON, D. C.

August 8, 1968

MEMORANDUM

To: Contract Compliance Officers

FROM: Ward McCreedy
Acting Director

SUBJECT: Discriminatory Seniority Systems

The purpose of this memorandum is to describe the policy of the Office of Federal Contract Compliance (OFCC) concerning the corrective action to be taken when it is disclosed that a Government contractor has been maintaining a seniority system which discriminates in violation of the equal employment opportunity clause in the Government contract.

These policy guidelines are based on the recent U. S. District Court decisions in *U. S.* v. *Crown Zellerbach* and *Quarles* v. *Philip Morris.*

In *Crown* and *Quarles* both Courts held that a racially discriminatory seniority system established before the effective date of the Civil Rights Act of 1964 was not a bona fide seniority system within the meaning of Section 703 of that Act. In addition to finding the present seniority systems in *Crown* and *Quarles* in violation of Title VII of the Civil Rights Act, the Court in *Crown* also held the seniority system to be in violation of Executive Order 11246.

While the legal issues in *Quarles* v. *Philip Morris* and *U. S.* v. *Crown Zellerbach* are similar in that they both deal with the problem of curing the present effects of past practices of racial discrimination within existing seniority

systems in industrial settings, there are differences in the remedies for eliminating the discrimination.

In the *Quarles* case, advancement to higher paying jobs was through a Departmental seniority system; that is, employees within a particular department used length of service in that department to bid for any other job in the department. Because Negroes had not been able to enter certain departments when they were hired, the later ability to transfer into those restricted departments left them with less Departmental Seniority than their white contemporaries who had entered into these departments when they were first hired. The remedy of the Court was to allow Negro employees transferring into the previously restricted departments to use their seniority from the date of hire, "employment seniority", for bidding against the white employees in the department. Since the "Departmental Seniority", of the white employees accrued from their date of hire, it was synonymous with "Employment Seniority" for Negroes. In effect, by permitting the transfer of Negro employees on this basis, the Court was still able to maintain the integrity of a departmental unit and still provide a method for obtaining their rightful place to the Negro employees.

In *Crown Zellerbach,* the system was different, so the remedy was also altered from the *Quarles* relief. In *Crown,* advancement to higher paying jobs was through lines of progression in particular departments or on specific machines within a department; that is, it was necessary to occupy each job in a progression line in ascending order and those employees in the job just below a vacancy would be the first considered for advancement to that position in the progression line. The qualified employee with the most service *in the job* below the vacancy would be offered the position. This is known as a "Job Seniority" system. Because Negroes had previously been restricted from entry into certain lines of progression, later movement into

these lines would result in loss of any recognition of mill seniority in future promotions. Negroes would be competing unfavorably with white employees, longer in the various jobs, but often much younger in total length of service.

The remedy of the Court was to permit Negro employees who were members of the class subject to past discrimination and who transferred into previously restricted progression lines to use their total length of service in the mill against the white employees total length of service in the mill for advancement from one job slot to another job slot when the Negro employee was in a group competing for vacancy. The difference between the *Crown* remedy and the *Quarles* remedy is that the former recognizes the requirement for advancement up a line one job at a time where experience in the lower job is a bona fide qualification to fill the next higher job.

Certain basic factors must be considered in fashioning a remedy to eliminate the effects of discriminatory seniority systems such as those found unlawful in *Crown* and *Quarles*. These basic principles are not negotiable and the failure of the agencies to apply these principles will be considered as a failure to meet the requirements of the Executive Order.

(1) Where a seniority system is found to perpetuate the effects of prior racial discrimination, the remedy must permit employees who were discriminated against, consistent with their qualifications as defined in (2) below, to compete equally for future positions with these employees of similar length of service who have not been subject to discrimination. In cases, such as *Quarles* and *Crown*, where opportunity for advancement by promotion or transfer is based upon seniority in a particular department, job, or job progression line from which employees were excluded because of their race, the remedy will require that movement through such departments or progression lines be condi-

tioned on a recomputation of seniority credits from the date of initial employment.

(2) Where advancement in job grade through promotion or transfer requires minimum and legitimate qualification in addition to seniority, the minimum qualifications required of any employee who has been discriminated against shall be no higher than those required of the least qualified employee hired concurrently or later than the effected worker. OFCC will also require close examination of requirements that employees must have served in prior jobs as a condition to advancement to determine whether such requirements are bona fide related to ability to perform the job to which the employee is otherwise eligible for advancement. In addition, where it is found that an employee is unable to qualify as a result of past discriminatory restrictions, the contractor may be required as part of the remedy to provide special training to qualify the employee for advancement.

(3) Any employee who was the subject of racial discrimination and whose seniority or job status is corrected in accordance with (1) or (2) above shall not suffer any diminution in wage rate or reduction in force and recall rights through such correction.

(4) Most situations will involve a remedy that changes a seniority system embodied in a collective bargaining agreement. The role of the compliance agency or the OFCC will be to identify the discriminatory elements found as a result of compliance reviews in the seniority system and state the kind of result which is required under the Executive Order. These matters will be communicated to the contractor and appropriate collective bargaining representatives as elements which must be eliminated and results which must be attained. Since there may be many ways to obtain the desired results in effectuating changes in a seniority system, it is the express policy of the OFCC that

the contractor and appropriate collective bargaining representatives have an opportunity [to] bargain over the method to be used in changing the seniority system. However, the agreements reached by any such bargaining will be subject to the Executive Order. The duty of contractors to bargain with representatives of their employees, a duty which the OFCC recognizes and endorses, cannot be used as an excuse for continued noncompliance.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1015

LOCAL 189, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC; UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, CLC, *Petitioners,*

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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UNITED STATES OF AMERICA

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REPLY BRIEF FOR PETITIONERS

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1. This reply brief is addressed to arguments raised for the first time in the briefs in opposition to our petition for writ of certiorari which were filed by the Government and by the private respondents on January 30, 1970; the Brief for the United States in Oppo-

sition was received by counsel for petitioners in the regular delivery of mail on February 2, 1970.

2. The Government concedes at the outset that the issue "raised by the decision below is a significant one, which will govern the employment practices of many employers in many sections of the country" (Brief for the United States in Opposition, p. 9).[1] In the light of the Government's concurrence that the issue we urge for review is one of *major* importance, affecting the public interest in the employment area on a national scale, we invite the attention of the Court to an extraordinary feature of its Brief in Opposition. This document discusses, and indeed accords prominence to, an argument and statement of position allegedly advanced in our Petition, of which no trace is to be found within its four corners, even by remote implication.

Inexplicably, the Government informs this Court in its Brief (p. 12), without benefit of any page citation to our Petition, that we "rely" upon "the 'bona fide seniority' language" of Section 703(h) of Title VII of the Act to support our contention that Congress intended to preserve "preexisting seniority rights". Moreover, the Government does not stop there, but

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[1] However, the Government argues that review of the decision below by this Court is not warranted because the decision of two other circuit courts of appeals have coalesced in basic accord with that of the court below. *United States* v. *Sheet Metal Workers, Local 36, et al.*, 460 F. 2d 123 (C.A. 8); *Griggs, et al.* v. *Duke Power Company*, 292 F. Supp. 243 (N.D. N.C.) (C.A. 4, No. 13,013, January 9, 1970). The decision of the Court of Appeals for the Fourth Circuit in the *Griggs* case, supervened between the time of filing of our Petition for Certiorari and the Government's Brief in Opposition.

We advert to this point at page 8, *infra*.

further unwarrantedly claims (*Id.* at pp. 9, 12-13) that we "concede" at the same time that this "construction of Section 703(h)"—which we purportedly urge—"would have precisely the 'freezing' effect which Judge Butzner foresaw" (when he stated in *Quarles* v. *Philip Morris,*[2] that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act").

The foregoing attribution is constructed from whole cloth in its entirety. Neither in our Petition filed with this Court (nor in our brief submitted to the court below, were that material) did we raise or rely upon any such argument based upon Section 703(h) of Title VII, which we regard as a strictly ancillary and peripheral provision, or make any such improbable concession. Consequently, it comes as no surprise when, *in flat contradiction of the Government,* counsel for the private respondents state that "Section 703(h) is not discussed in the Petition for Certiorari" (Private Respondents' Brief in Opposition, p. 15).[3] Con-

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[2] 279 F. Supp. 505, 516 (E.D. Va.).

[3] Our petition (as did our brief below) contains a single tangential reference to Section 703(h), pointing out by way of a footnote, and in a brief sentence, that as Senator Humphrey explained prior to the adoption of this amendatory section by the Senate, it does not "narrow application" of the operative sections (703(a) and (e)) of Title VII, but simply authorizes, under certain circumstances, different terms of employment for employees within the framework of a "bona fide seniority system" (Petition, p. 8, fn. 12). We therefore regard the emphasis which counsel for the Government and private respondents place upon this section as misplaced (Private Respondents' Brief in Opposition, pp. 13-15) and the reliance of the court below upon the interpretation accorded this permissive provision in *Quarles* v. *Philip Morris, supra,* (Appendix to our Petition, pp. 29, 42), as further error—error, however, which is overshadowed by those to which we have directed the Court's attention in our Petition.

ceivably, counsel for the Government may have confused us at this late date with some other litigant in some other case arising under Title VII of the Act. Whatever the nature of the inadvertancy, this misdirected approach and extreme distortion of our posture before this Court hardly serves to promote clarification of the issue here by the opposing parties.

While so diverted, the Government has made no effort in its opposition brief to meet the outstanding challenge inherent, for example, in the capstone placed placed upon the legislative history (according finality to the Congressional intent to protect previously accrued seniority) by Representative McCullough, on the eve of final passage of the Act by the House of Representatives, following Senate action on the measure (Petition, pp. 7-8, 23-24). The conspicuous silence of the Government on this score indicates that if there is a persuasive refutation or negation of this apparently determinative climax, it has not yet come to light.[4]

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[4] Counsel for the private respondents, while co-authors of a leading law review article which treats the legislative history of Title VII at some length, likewise have maintained an eloquent silence in this connection in their Brief in Opposition filed with this Court.

As academic experts, counsel for private respondents, of course, are aware that Representative McCullough has been an outstanding figure and prime mover in the bipartisan Congressional program for civil rights legislation over the past two decades, "who played a key role in the preparation of the House bill" (LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office, Washington, D. C., at 3023), so that his public word to the House of Representatives may not be taken lightly; also that he was, at this juncture, appraising the final version of Title VII of the Act (as counsel affirm in their study to which they allude frequently in their Brief in Opposition—Cooper and Sobol, "Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring

Nor does the Government in its brief seek to cope realistically with any of the significant Senate landmarks on seniority in the legislative history, pinpointed in our Petition (pp. 6-7, 21-24). To insist, merely on the basis of reciting the statutory language, that "the Act clearly reveals a contrary purpose" from that signified by the circumscribing statements of its prominent sponsors (Brief in Opposition, p. 9), or that pre-Act seniority is defeasible because "the legislative history discloses a Congressional intent 'to eliminate . . . discrimination in employment based on race' " (*Id.* at p. 10), is to indulge in unsupported conclusions or bland generalities that are not instructive and do little to raise the level of the dialogue before this Court.

In similar fashion, the Government dismisses our argument that the court below improperly raised the

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and Promotion", 85 Harv. L. Rev. 1598, 1611 (1969). See: LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, *supra*, at 3001, 3031.

This effectively neutralizes any force in the contention advanced by counsel (Brief in Opposition, pp. 13-15), which we think specious in any event, that the saving legislative comments regarding preexisting seniority were made prior to final revision of Title VII. Thus, we are at a loss to understand, why counsel—studiously ignoring this final and decisive chapter in the legislative history as if it had never been written—revert only to the antecedent Senate history (Brief in Opposition, pp. 13-14), which they seek to deprecate in a manner we believe invalid, but for reasons with which we think it inappropriate to further burden the Court at this point. Suffice it to say that, as noted in our Petition (p. 8), the key non-discrimination sections (703(a) and (c)) of Title VII remained intact in their journey through the Senate, where the changes in the House bill concerned largely procedural and enforcement rather than substantive matters. The addition there of 703(h), a permissive provision authorizing disparate employment terms under statutorily defined conditions (see fn. 3, p. 3, *supra*), does not, by some legerdemain mean that we have been discussing a "bill that did not pass" and "ignoring . . . the bill that did", as counsel for the private respondents would have it (Brief in Opposition, p. 15).

statutory rights here in question to the same level as constitutional rights (Petition, pp. 24-27) with the bare—and, we submit, wholly inadequate—comment that the cases protecting constitutional rights upon which the court below relied (*e.g., Louisiana* v. *United States,* 380 U.S. 145) present "related contexts" (Brief in Opposition, p. 12).

3. We think that the Government's Brief in Opposition, as well as that of the private respondents, significantly reenforces our plea, because far greater import attaches to what was left unsaid than what was said in each. The Government's approach is epitomized in the syllogism it advances that the "holding of the court below follows inescapably from the premise on which it is based"; in other words the decision of the court below is correct because it is correct (Brief in Opposition, pp. 9-10).

While the technique of avoiding the legislative specifics unfavorable to one's cause falls comfortably within the conventional bounds of advocacy, more is required, we believe, when the issue at the highest level is whether or not an act of Congress of this stature warrants review here. The Government does not advance or suggest a serious answer to the clearly expressed Congressional intent to protect pre-Act seniority against post-Act effects, but is content to fall back on simply quoting from the interpretation adopted by Judge Butzner in *Quarles* v. *Philip Morris, supra*—critically evaluated in our Petition—whose decision in that case does not, of course, constitute precedent in this forum.

In the last analysis, it was the Congress of 1964 which enacted the measure in question, in the light of

the unique problems confronting the national legislature at that time in securing passage of the Act and in determining the particular means believed best suited to attain the desired equal employment opportunity objectives. The position of respondents here is, in essence, that they would have adopted different means and gone farther faster, notwithstanding that, as phrased by counsel for the private respondents, ". . . some of the incumbent white employees would have acquired their jobs and expectancies even if there had not been prior discrimination, and these individual whites will in a sense suffer unfairly if new black employees pass them by."[5]

The overriding fact remains, however, that the Congress of 1964 did not share this view, and so stated in terms of a public pledge to the industrial working force of the Nation, a segment of which stands elbow-to-elbow with the minority employees and in much the

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[5] Cooper and Sobol, *supra*, at 1606. In their Law Review dissertation, counsel for the private respondents go on to say (*Ibid.*):

> ". . . But because it is impossible to determine which of the present white employees derived no benefit from the past exclusion and because the entire white employee group in the aggregate acquired its expectancies at the expense of black workers, the expectancy of any individual can be viewed as tainted by the past discrimination."

They concede, however, that:

> ". . . [T]here is the practical problem of the reaction of white workers to revisions in seniority practices that deprive them of earnings and promotions they otherwise would have received and that could cause the layoff of white workers in favor of blacks. The potential for political and other forms of resistance to changes of this kind is obviously very great, entirely unlike the reaction to the elimination of discrimination in hiring standards, which has a less obvious effect on individual white workers." (*Id.* at 1678-1679).